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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WASTE CONVERSION, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF OF AMICUS CURIAE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF WASTE CONVERSION, INC.'S PETITION FOR WRIT OF CERTIORARI

TERRY R. BOSSERT
McNees, Wallace & Nurick
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Counsel of Record for Amicus Curiae Pennsylvania Chamber of Business and Industry

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I. INTEREST OF AMICUS CURIAE

The Pennsylvania Chamber of Business and Industry (hereinafter the "Chamber") submits this Brief as Amicus Curiae in support of the Petition for Writ of Certiorari of Waste Conversion, Inc. (hereinafter referred to as "WCI") pursuant to Supreme Court Rule 37.2.

The Pennsylvania Chamber of Business and Industry is the statewide trade association representing all aspects of Pennsylvania commerce and industry. The Chamber's membership includes both large and small businesses. The purpose of the Chamber is to promote the welfare of commerce and industry in the Commonwealth in general, and specifically, to serve as liaison throughout the Commonwealth on issues affecting business and industry.

The pending Petition for Writ of Certiorari involves issues of vital importance to the Chamber and its members. The primary issue of concern to the Chamber is whether, pursuant to Section 610(8) of the Pennsylvania Solid Waste Management Act (hereinafter the "SWMA"), 35 P.S. §6018.610(8)(i), vicarious criminal liability may be imposed upon a business for acts or omissions of third parties. Many of the Chamber's members can and do assign wastes to independent waste transporters in accordance with the applicable laws and regulations. Pursuant to the rulings of the Pennsylvania courts in this case, those companies could be held vicariously liable for unlawful acts by such independent transporters. Those decisions, if upheld, will have a substantial detrimental impact on the Chamber and its member companies.

The Chamber submits that the Pennsylvania courts erred in finding that 35 P.S. §6018.610(8)(i) is constitutional to the extent that it permits the imposition of

vicarious criminal liability upon businesses for the unlawful acts of independent companies.

II. SUMMARY OF ARGUMENT

Section 610(8) of the Pennsylvania Solid Waste Management Act, 35 P.S. §6018.610(8), subjects a generator of waste to liability for unlawful disposal of waste transferred to a third party even if the generator complied with all applicable regulations and took all reasonable precautions to ensure proper and lawful transportation and disposition of the waste. Because this vicarious liability offense is punishable by imprisonment and punitive criminal fines, however, it is actually a "true crime" of which a person cannot be convicted absent evidence of criminal intent. To the extent that Section 610(8) imposes vicarious criminal liability, therefore, it violates the due process clause of the fourteenth amendment to the United States Constitution.

Moreover, although persons may be convicted of some "public welfare" offenses even in the absence of criminal intent, Section 610(8) cannot be defined as such an offense. This Court has emphasized that vicarious liability for public welfare offenses is permissible because the defendant is in some way able to control the unlawful conduct. Since Section 610(8) permits conviction even in the absence of any ability on the part of the defendant to control the unlawful conduct, it unlawfully imposes vicarious criminal liability.

If this Court permits the imposition of vicarious criminal liability upon businesses for the unlawful acts of independent companies, such a policy will have a substantial detrimental impact on the Chamber and its member

companies, as well as upon commerce throughout the Commonwealth of Pennsylvania, in neighboring states, and perhaps nationwide.

III. ARGUMENT

A. 35 P.S. §6018.610(8)(i), BY IMPOSING VICARIOUS CRIMINAL LIABILITY UPON BUSINESSES FOR THE UNLAWFUL CONDUCT OF THIRD PARTIES, IS UNCONSTITUTIONAL.

1. The Penalties Which May Be Imposed for Violation of 35 P.S. §6018.610 Establish That it is a "True Crime" of Which a Person Cannot Be Convicted Absent Evidence of Criminal Intent.

The applicable sections of the SWMA are set forth in WCI's Petition and the Appendices thereto. As those sections establish, criminal penalties may be imposed upon any and every party in the chain of custody of waste, whether hazardous or nonhazardous, for the illegal handling of that waste by any subsequent party in the chain of custody. More specifically, upon being found guilty of any "unlawful conduct," including that conduct described in Section 610(8), a person "shall be sentenced to pay a fine of not less than $1,000 but not more than $25,000 per day for each violation or to imprisonment for a period of not more than one year." 35 P.S. §6018.606(b). Thus, if a business is found vicariously liable under Section 610(8), and is therefore found guilty of a misdemeanor of the third degree pursuant to Section 606(b), it is subject to a fine of not less

than $1,000 per day or imprisonment for not more than one year, or both. The issue upon which the Chamber focuses in this Amicus Brief, then, is whether the SWMA is unconstitutional to the extent that it imposes criminal penalties, including potential imprisonment, upon persons or entities for the unlawful conduct of third parties over which they may have no control.

The constitutional protection upon which the Petitioner and the Chamber rely in challenging the SWMA is independently based in the due process clause of the United States Constitution (U.S. Const. Amend. XIV). This provision guarantees that a person is not to be deprived of life, liberty, or property without due process of law.

Included in the concept of due process is a degree of protection against the imposition of criminal liability without criminal intent on the part of the actor.

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250, 72 S. Ct. 240, 243 (1951) (footnote omitted). The federal courts have recognized that there are due process limitations on the legislative power to remove intent from a criminal enactment. See, e.g., Morissette v. United States, supra. In Morissette, supra, this Court distinguished common law crimes from regulatory or "public welfare" offenses, which consist mainly of violations of regulatory provisions dealing with public health, safety, and welfare. Morissette v. United States, supra, 342 U.S. at 254, 72 S. Ct. at 245. The Court

noted that such regulatory or "public welfare" offenses do not come under any

> accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. ...In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and a conviction does no grave damage to an offender's reputation.

Morissette v. United States, supra, 342 U.S. at 255-56, 72 S. Ct. at 246 (footnotes omitted).

In Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960), Justice Blackman, then a Circuit Judge, distilled from Morissette, supra, and other cases, the wisdom of the Supreme Court on the permissibility of imposing criminal sanctions on actions done without intent:

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard

> imposed is, under the circumstances, reasonable and adherence thereto properly expected of person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, supra, 282 F.2d at 310 (citations omitted). Of course, should the factors enumerated above be otherwise with respect to a given statute or regulation then the elimination of intent from the legislation or regulation may violate due process of law. See, e.g., Commonwealth v. Barone, 276 Pa. Super. 282, 419 A.2d 457 (1980) (Spaeth, J., concurring).

Thus, under the due process clause of the Fourteenth Amendment to the United States Constitution, the Courts have determined that while a defendant may be held vicariously liable for a "public welfare" offense, a defendant may not be found guilty of a "true crime" absent the requisite "mens rea" or criminal intent. Because Section 610(8) of the SWMA clearly contains no "mens rea" or criminal intent requirement, it can pass constitutional muster only if it is properly defined as a "public welfare" offense rather than a "true crime."

Since the SWMA would permit a court to imprison an individual for an offense which does not involve "personal causation" in that guilt can be based solely on a finding of vicarious liability under Section 610(8), the SWMA violates the standards set forth in Morissette and its progeny. Since punitive fines or even imprisonment may be imposed upon a person for violation of that section, it is a "true crime"

rather than a "public welfare" offense. By permitting persons to be convicted of a "true crime" without requiring evidence of criminal intent, Section 610(8) violates the due process clause of the Fourteenth Amendment.

Violation of Section 610(8) cannot be considered a "public welfare" offense because the factors which the courts have identified which would permit convictions for public welfare offenses even in the absence of mens rea are not applicable to Section 610(8). As noted above, the United States Supreme Court discussed public welfare offenses as follows:

> Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.... In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity.... The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Morissette v. United States, supra, 342 U.S. at 255-56, 72 S. Ct. at 246 (footnote omitted). The penalties under the SWMA are not "relatively small" and a conviction does "gravely damage" the purported offender's reputation.

Moreover, the Chamber also notes that the Morissette analysis implies that the reason a person may be held vicariously liable for public welfare offenses is because the "accused" is "in a position to prevent [the offense] with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." Id. Unfortunately, this is not the case with respect to Section 610(8) of the SWMA. Indeed, that section exposes every party in the chain of custody of waste to potential criminal prosecution, and indeed imprisonment, for the illegal handling of that waste by any subsequent party in the chain of custody despite good faith compliance efforts, and indeed, despite totally blameless conduct on the part of the previous parties in the chain of custody. Moreover, the SWMA contains no geographic or time limitations which would minimize a business' potential liability.

Furthermore, a generator who complies with all regulations and permits is not "in a position to prevent [the offense] with no more care than society might reasonably expect." Rather, Section 610(8) permits absolute vicarious criminal liability with potential penalties of $25,000 and/or imprisonment for one year, despite the generator's total inability to prevent the ultimate unlawful activity. Indeed, the Chamber submits that this Court should focus on the fact that liability may be imposed under Section 610(8) despite a party's lack of "control" over the unlawful conduct of a third party. Even those cases which have permitted vicarious liability for "public welfare" offenses have supported their finding by noting that it was not improper to hold an individual vicariously liable because he had some "control" over the individual who acted unlawfully or over the unlawful act itself.

Thus, because Section 610 of the Pennsylvania Solid Waste Management Act establishes a "true crime" rather

than a "public welfare offense," that provision is unconstitutional to the extent that it permits the imposition of vicarious criminal liability upon businesses for the unlawful acts of independent companies.

2. Policy Considerations Require That This Court Declare Section 610(8) of the SWMA Unconstitutional.

Under Section 610(8) of the SWMA, criminal liability may be imposed upon any business in the chain of custody of waste despite the fact that it is "in no position to control" the unlawful conduct. Imposing criminal liability on the first person in the chain of custody who acts in a totally blameless fashion for the unlawful conduct of a third party perhaps six links removed in the chain can in no way further the goals of the SWMA. Unlawful conduct by a third party over which the blameless party has no control cannot be deterred by imputing vicarious liability to the blameless party.

The Chamber submits that permitting such vicarious liability for acts over which a party has absolutely no control, and despite the good faith compliance efforts of the defendant, is not only unconstitutional but will have an enormous detrimental impact on business and industry throughout the Commonwealth, in neighboring states, and perhaps nationwide. Waste generators face the greatest exposure under Section 610(8) of the SWMA since they are at the beginning of the waste's chain of custody. If the Pennsylvania courts' decisions are permitted to stand, generators will be increasingly reluctant to do business in the Commonwealth if, as a by-product of their activities, they may be subject to significant fines or even imprisonment for the conduct of independent third parties over whom they

have no control. Moreover, the SWMA, as interpreted by the Pennsylvania courts, will impact not only Pennsylvania companies operating within the Commonwealth, but any company that has its waste shipped to, or even through, Pennsylvania. The effect of this legislation on interstate commerce, then, is potentially enormous and burdensome.

It would appear that the principle objective in permitting vicarious criminal liability for violations of the SWMA is to encourage all parties in the waste chain of custody to exercise due care in transporting and disposing of the waste. If, however, a party cannot realistically influence the conduct of another, this objective cannot be met. In many cases, such as the one at bar, the first party in the chain of custody cannot possibly prevent the unlawful conduct of parties further down the chain of custody. The imputation of criminal liability upon the first party, therefore, is fallacious and has no legal foundation. Perhaps more importantly, businesses that operate or handle solid waste will be reluctant to operate in Pennsylvania because of the possibility of being convicted of strict liability offenses on purely vicarious grounds. As a result, the interstate movement of waste materials and all associated commercial activity will be seriously impeded.

Although the Chamber applauds the efforts of the Legislature of the Commonwealth of Pennsylvania to control the flow of waste throughout the Commonwealth, the vicarious liability provision of Section 610(8) serves only to interfere with private companies' attempts to participate in those efforts. Indeed, if the Pennsylvania courts' interpretations are permitted to stand, Section 610(8) will have a deleterious and detrimental effect on all businesses and industries operating within the Commonwealth of Pennsylvania, whether or not those companies are incorporated or headquartered in Pennsylvania.

Because a finding of vicarious liability under Section 610(8) of the SWMA cannot further the goals of the SWMA, and because a finding of a violation of that section cannot be defined as a "public welfare" offense but rather must be considered a "true crime," to the extent that it subjects a violator to punitive fines and imprisonment, that section is unconstitutional.

IV. CONCLUSION

For the reasons set forth above, the Pennsylvania Chamber of Business and Industry, as amicus curiae, respectfully requests that this Court grant WCI's Petition for a Writ of Certiorari.

Respectfully submitted,

McNEES, WALLACE & NURICK

By Terry R. Bossert

TERRY R. BOSSERT
100 Pine Street
P. O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Counsel of Record for Amicus Curiae Pennsylvania Chamber of Business and Industry

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CONSENT TO FILING OF AMICUS CURIAE BRIEF BY THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY

The undersigned, counsel to the above-referenced parties, Waste Coversion, Inc. and the Commonwealth of Pennsylvania, hereby consent to the filing of an Amicus Curiae Brief by the Pennsylvania Chamber of Business and Industry in Support of the Petition for Writ of Certiorari filed by Waste Conversion, Inc.

Counsel for Waste Conversion, Inc:

Richard L. Caplan

Richard L. Caplan, Esquire
CAPLAN & LUBER
Suite 1500
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103

Counsel for the Commonwealth of Pennsylvania:

Roseann B. Termini

Roseann B. Termini, Esquire
Deputy Attorney General
Commonwealth of Pennsylvania
Appeals & Legal Services Section
1600 Strawberry Square
Harrisburg, PA 17120

Robert A. Graci

Robert A. Graci
Chief Deputy Attorney General
Office of Attorney General
1600 Strawberry Square
Harrisburg, PA 17120